COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department as to the propriety of the rates and charges set forth in M.D.T.E Tariff No. 17, filed with the Department on April 6, 2001, to become effective on May 6, 2001, by New England Telephone and Telegraph Company d/b/a Verizon Communications, Inc.

D.T.E. 98-57

(Phase IV)

AT&T's Request For The Department To Adopt A Procedural Schedule

That Will Allow For An Appropriate Investigation Into

The Reasonableness Of Verizon's April 6, 2001, Tariff Filing

Pursuant to the Hearing Officer's Memorandum issued on May 2, 2001, AT&T Communications of New England, Inc. ("AT&T") requests that the Department of Telecommunications and Energy ('the Department") adopt a procedural schedule that will allow for an appropriate investigation into the reasonableness of Verizon's April 6, 2001, Tariff Filing ("April 6 Tariff Filing"). As the Hearing Officer has acknowledged, CLECs "have raised legitimate concerns regarding the revisions to the enforcement provisions which require further investigation before Department approval." See Hearing Officer's Memorandum dated May 2, 2001. AT&T has set forth a proposed procedural schedule in Attachment A.

A. Further Investigation Is Needed In Order To Clarify Ambiguities In the April 6 Tariff Filing.

As AT&T, Covad and Allegiance ("the Joint Commentators") pointed out in their joint comments filed on April 13, 2001, Verizon's tariff is rife with ambiguities that need to be clarified in order for the parties and the Department to clearly understand how Verizon's tariff will work in the real world. See Joint Comments at 12-16. For example, the Joint Commentators pointed out ambiguities in the tariff sections regarding the penalties that Verizon proposes to impose in situations where a CLEC draws more power than it had ordered. See id. at 12-13. They also pointed out ambiguities in Verizon's proposed non-recurring Miscellaneous Collocation Power Service Charge found at Part E, Section 2.6.13. See id. at 14. As the Joint Commentators have pointed out, these ambiguous provisions could be completely unreasonable and in violation of state and federal law, depending on how Verizon intends to interpret them. See id. at 12-16. The Department and the parties will not be able to determine whether Verizon's proposals are reasonable until all such ambiguities are clarified.

The only way to clarify such ambiguities is for the parties and the Department to investigate how Verizon would apply the tariff in specific situations. Such clarification can be accomplished best by having Verizon file testimony explaining

its tariff and then by giving the Department and interested parties a chance to probe Verizon's explanations by putting hypothetical situations to Verizon and having Verizon explain how the tariff provisions would apply to such situations. Discovery, cross-examination, and briefing are the most effective tools for this necessary work and, in the present case, can be accomplished without severely taxing the Department's resources.

B. Further Investigation Is Needed In Order To Determine Whether Verizon's April 6 Tariff Filing Is Reasonable And In Compliance With Federal And State Law.

The Department and the parties need an opportunity to investigate the reasonableness of Verizon's new provisions, in particular its proposed penalty provisions (for situations where a CLEC draws more power than it had ordered). The Department and the parties also need to investigate whether there are any alternative methods available for assuring CLEC compliance with Verizon's tariff and whether Verizon's process for ordering collocation power, including the form of Verizon's collocation application is reasonable.

1. Further Investigation Is Needed To Determine Whether Verizon's Proposed Penalty Provisions Violate Federal And State Law.

Verizon's proposed penalty provisions appear, on their face, to violate a variety of federal and state laws. First, the Telecommunications Act of 1996 mandates that charges be based on cost by requiring "just and reasonable rate[s] for the interconnection of facilities and equipment" where such rates "shall be (i) based on the cost . . . and (ii) nondiscriminatory." 47 U.S.C. 252(d)(1). At this time, it appears that Verizon's proposed penalties found in the April 6 Tariff Filing do not meet this test because they do not appear to be substantiated by any cost study that was performed or order that was issued in the Department's investigation into Verizon's rates in the Consolidated Arbitrations docket. See Joint Comments at 9. Second, 220 CMR 5.02(3)(b) of the Department's rules requires that tariffs provide sufficient detail to permit the customer to determine the basis for the charges. The revisions to Tariff 17 in no way explain the basis of Verizon's penalties, nor why it chose the arbitrary cut-off point of 110%. See id. Third, it is well settled in the Commonwealth of Massachusetts that punitive damages are not allowed unless expressly authorized by statute. Flesner v. Technical Comms. Corp., et al., 410 Mass. 805, 575 N.E.2d 1107 (1991). See also Santana v. Registrars of Voters of Worcester, 398 Mass. 862, 867, 502 N.E.2d 132 (1986); USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 353, 467 N.E.2d 1271 (1984). Without further investigation, the Department and the parties can only conclude that Verizon's unsupported and ambiguous penalty provisions are nothing more than punitive damages which would be illegal because they are not authorized by statute.

2. Verizon's Proposal Regarding The Fuse Size That CLECs Are Allowed To Order Appears To Be Unreasonable And Contrary To Verizon's Past Practices.

As the Joint Commentators pointed out, there are also serious questions regarding the reasonableness of Verizon's proposed Part E, Section 2.6.13 which provides that "[t]he Telephone Company will permit the CLEC to order a fuse size at 2.5 times the load amps ordered." See Joint Comments at 6-7. Such a limit would immediately throw most, if not all, collocation arrangements out of compliance because they all are already fused by at least 2.5 times the requested load, with the vast majority fused at 3 times the load on each feed. See id. at 6. Verizon's own collocation application (i) dictated that requested amperage be fused at 1.25 to 1.5 times the requested amps (although Verizon almost always used the 1.5 multiplier), and (2) assumed that there would be two feeds each carrying the total requested load amps (as opposed to half of the requested load amps). See id. at 7. Thus, any existing collocation arrangement must by necessity be fused to at least 2.5 times the requested load per feed already, and most likely is fused at 3 times the requested load per feed. See id. at 6-7. With this background, it appears that it would be unreasonable for Verizon to impose a limit in Section 2.2.1.B.1 of anything less than 3 times the load amps ordered, or at the very least order that all existing collocation arrangements be grandfathered at their existing fused amperage.

Otherwise, CLECs will be required to submit applications to correct over-fusing that Verizon is actually responsible for creating under the instructions in the collocation application. See id. at 7. The Department and the parties need to conduct further investigation to determine whether Verizon's proposal is as unreasonable as it seems and whether or not there are any more reasonable alternatives that would satisfy the needs of all parties, including Verizon.

Conclusion.

For the reasons stated above and in the Joint Comments, the Department should order further investigation into Verizon's April 6 Tariff Filing and should adopt the schedule proposed by AT&T as set forth in Attachment A.

AT&T Communications of New England, Inc.,
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May 17, 2001

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on May 17, 2001.

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Attachment A

Proposed Schedule

AT&T requests that the Department adopt the following schedule for investigation of Verizon's April 6, 2001, Tariff Filing:

Ten (10) days after the Department issues a ruling on AT&T's request for further procedure, Verizon files initial testimony explaining its proposed tariff;

Within ten (10) days after Verizon files its initial testimony, the Department and all other interested parties that wish to propound discover on Verizon must do so;

Verizon must response to all discovery requests within ten (10) days;

All other interested parties that wish to file initial testimony must do so no later than ten (10) days after the due date of Verizon's discovery responses;

Verizon then has ten (10) days to propound discovery on any party that filed initial testimony;

Parties have ten (10) days to respond to Verizon's discovery requests;

Hearings will be held five (5) days after the discovery responses of these other parties are due. It is anticipated that these hearings will likely last one or two days;

Record request responses are due ten (10) days after the close of hearings;

Initial briefs are due ten (10) days after record request responses are due;

Reply briefs are due ten (10) days after initial briefs are filed.